

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	<b>CG Docket No. 02-278</b>
	)	<b>CC Docket No. 92-90</b>
<b>Rules and Regulations Implementing</b>	)	
	)	
<b>the Telephone Consumer Protection</b>	)	
	)	
<b>Act of 1991</b>	)	

**Late Filed  
Reply Comments of Joe Shields  
to Further Notice of Proposed Rulemaking**

**Introduction**

My name is Joe Shields. I am a resident of Harris County, Texas. I thank the Commission for providing the public with the opportunity to comment on the Commission's rules and regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991, the implementation of the Federal Do-Not-Call Act, and more specifically the comments made by others in this proceeding

**Reply Comments**

**Request for Exemption under the McCarren-Ferguson Act.**

Stonebridge Life Insurance Company states in its comments: "It has long been settled that insurance advertising, **of which telemarketing is a function**, constitutes the "business of insurance" under McCarran-Ferguson." The American Council of Life Insurers comments: "the ACLI believes that the Commission's proposal would conflict with the McCarran-Ferguson Act and, therefore, **the final rule should not be applicable to insurers.**"

**Telemarketing is not the business of insurance!** The McCarran-Ferguson Act regulates the **business of insurance** i.e. the issuance of policies, collecting policy premiums, the inherent risk-taking of insurance policies and paying policy claims. The McCarran-Ferguson Act **is not** a blanket exemption from all other laws as the insurance industry would have the Commission believe<sup>1</sup>.

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<sup>1</sup> "McCarran-Ferguson Act...does not preempt application of Constitution and other federal laws." Moore v. Aegon Reinsurance Co. of America, N.Y.A.D. 1 Dept.1994, 608 N.Y.S.2d 166, 196 A.D.2d 250, certiorari dismissed 115 S.Ct. 35, 512 U.S. 1283, 129 L.Ed.2d 931. ***"The Supreme Court has stated that the McCarran-Ferguson Act "does***

The Commission has already ruled on this issue the insurance industry is attempting to raise by issuing citations to insurance company's and insurance agents that violated the TCPA and the Commissions rules<sup>2</sup>.

Nevertheless, since the insurance industry has raised the issue the Commission **should specifically rule** that the TCPA and any national do-not-call list apply to "**any person within the United States**" and that includes insurance agencies and insurance agents.

### **Request for Exemptions for Calls in Which No Sale is Made**

The National Association of Insurance and Financial Advisors comments: "The FCC also should follow some the FTC's rule in **exempting from its coverage calls in which no sale is final** and no payment is authorized until there has been a face-to-face meeting."

**There is no such exemption in the TCPA!** The definition of a telemarketing call in the statute and in the Commissions rules is clear:

*"The term ``telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person..." 47 U.S.C. § 227(a)(3); "The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person..." 47 C.F.R. § 64.1200(f)(3)*

The Commission has already ruled on this issue the insurance industry and financial institutions are attempting to raise by issuing citations to nine financial service businesses that violated the TCPA and the Commissions rules<sup>3</sup>.

Nevertheless, since the insurance and financial industry have raised this issue the Commission **should specifically rule** that the TCPA applies to "**any person within the United States**" and that includes insurance agencies, insurance agents, financial institutions, financial brokers, mortgage brokers, etc.

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*not exempt the business of insurance companies. . . . The exemption is for the `business of insurance.'" Royal Drug, 440 U.S. at 210-11, 99 S.Ct. at 1073.*

<sup>2</sup> See FCC Citations: EB-02-TC-139 Michael Miller Insurance; EB-02-TC-257 American Health and Life Insurance (Prerecorded Telephone Solicitations)

<sup>3</sup> See FCC Citations: EB-02-TC-034; EB-02-TC-062; EB-02-TC-065; EB-02-TC-122; EB-02-TC-134; EB-03-TC-003; EB-03-TC-013; EB-03-TC-021; EB-03-TC-031 (Prerecorded Telephone Solicitations)

## The Federal Trade Commission's "Safe Harbor"

In response to the Federal Trade Commission ("FTC") comments seeking, in some instances, the creation of a "safe harbor", I repeat my previous comments here:

Congress has authorized the FCC to regulate telecommunications. The FCC has not delegated any authority to the FTC to regulate telecommunications nor has it been directed to do so by Congress. The FCC should specifically rule that, by the authority vested in the FCC by Congress, its rules pre-empt all other rules dealing with the regulation of telecommunications. That includes any state or federal agency that, even with good intentions, has crossed into FCC jurisdiction.

The FCC should exercise its authority and **should specifically rule that all hang-up or dead air telemarketing calls** which do not identify the caller **have always been and will remain violations of the TCPA until Congress modifies the TCPA.**

Furthermore, the FCC should exercise its authority and **should specifically rule that all prerecorded messages** including those made because a live telemarketing agent is not available **have always been and will remain violations of the TCPA until Congress modifies the TCPA.**

## Economic Impact of a National Do-not-call List

Teleperformance USA has submitted to the Commission many letters complaining about lose of jobs and the impact to the economy a national do-not-call list will supposedly have. Here again the telemarketing industry miss-represents the true nature of their business. Those consumers that will submit their telephone number to a national do-not-call list have never and will never buy anything from a telemarketer.

A recent article even goes as far as to make this alarmist statement in referring to the economic impact of a national do-not-call list:

*"Without a doubt this will cause worldwide economic catastrophe. I am not an alarmist. But mark my words, when I say the government backing and subsequent free marketing of this list will plunge the world into depression."* Customer Inter@ction Solutions, What More Could "The Industry" Have Done? By Rich Tehrani, Group Editor-In-Chief, Technology Marketing Corporation (full article attached)

This dooms-day forecast and the letters submitted by Teleperformance USA are nothing more then "the sky is falling" claims.

## Existing Business Relationship Exemption

Many commentators are pressing the Commission to carve out, what I perceive to be, an across the board “blanket” exemption from the current Commissions rules and a National do-not-call list. It has been established in the courts that the Commission did not have the authority under the TCPA to create such an exemption. This exemption has and will be used as a tool to neuter the TCPA.

As an example, this excerpt from the Inbound Calls Incorporated web site claims to have a business relationship with every consumer in the country and now makes an estimated four (4) million unlawful prerecorded telephone solicitations per day for travel packages, mortgage companies, satellite systems, etc.:

*Over the last 15 years, the National Entertainment Affiliate Program (NEAP) has compiled a unique database. It includes potential clientele who have entered their name and phone number, either online at [www.digitalwinnings.com](http://www.digitalwinnings.com), or in shopping malls throughout the country, to win an award (i.e., car, digital camera, satellite dish, cell phone, travel package, etc.). Other forms of collecting this data are through selected hotels, resorts and restaurants throughout the country. Currently the NEAP gets approximately 25,000 new entries per day into its unique database. This translates into a dynamic database of potential clients. (from [www.inboundcalls.com](http://www.inboundcalls.com) captured on August 01, 2002 hosted by Fax.com – see attached)*

Another example that shows to what length the telemarketing industry believes the business relationship can be abused:

*Thus, calls to persons with whom you, a subsidiary or affiliate have an existing business relationship are exempt from the ban as are calls which do not contain information regarding the availability or quality of specific goods or services. The former category, obviously, gives opportunity for cross marketing of products, while the latter allows calls with certain scripting to any consumer.*

*Thus, you can deliver recordings to consumers if the recording does not include an unsolicited advertisement or are to consumers who are your existing subscribers or customers of your affiliates or subsidiaries. In my opinion, you can script a call so as to avoid this definition by not including information concerning the availability or quality of any property, goods or services.*

(Re: Delivery of Recordings, October 16, 2002, Copilevitz & Canter, LLC – see attached)

The above even suggests that a commercial artificial or prerecorded voice message can be scripted to purposely evade the requirements of the TCPA!

The Commission should remove the prior existing business relationship exemption from its rules. The “prior express consent”, requiring businesses to “ask first” is sufficient in permitting telemarketing to a businesses customer provided that such business has obtained such “prior express consent”.

## **Freedom of Speech**

The American Teleservices Association comments: “...the FCC must approach the TCPA-required balancing with great care and due regard for telemarketers’ First Amendment rights.” I submit this article in response to such ludicrous Freedom of Speech arguments:

*"Free speech is too important to our free society to be so limited," one flag-waving telemarketer wrote the Federal Trade Commission, urging rejection of a do-not-call list. "For these reasons, we tolerate:*

*Some distasteful pornography,*

*Distortions (and sometimes worse) of a free press,*

*The nuisance of receiving some telemarketing calls that we don't want."*

***So there you have it! Telemarketing is as important to Jefferson's America as Juggs magazine and Jayson Blair!***

(from ctnow.com: Don't Call Us, We'll Call You, Matthew Kauffman, May 21 2003 – full article attached)

The telemarketing industry has never shown “care and due regard” to consumer’s constitutionally guaranteed privacy and property rights! As I stressed in my earlier comments – the TCPA is a time, manner and place restriction and has withstood **all** constitutional challenges.

## **Conclusion**

I have provided the Commission with a table of telephone solicitations to one of my residential telephone lines. The table is empirical data that proves the telemarketing industries lack of compliance with current laws and rules - 76% of the telephone solicitations to that one line were unlawful prerecorded telephone solicitations.

In light of this lack of compliance of the telemarketing industry with current laws and regulations the Commission should strengthen its rules not create or agree with the loopholes or safe harbors the telemarketing industry attempts to create and will surely exploit. The FTC and telemarketing industry proposed safe harbors will not benefit the public – only the telemarketing industry will benefit. That is not consumer protection!

I want to again thank the Commission for providing the opportunity to the public to comment on the Commission's rules and regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991.

Respectfully submitted,

\_\_\_\_\_/s/

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## What More Could "The Industry" Have Done?

By [Rich Tehrani](#),  
Group Editor-In-Chief, Technology Marketing Corporation

We have been deluged with responses regarding our position on the Federal Trade Commissions changes to the Teleservices Sales Rule, specifically the creation of a Federal do-not-call list. Responses have been all over the board, and interestingly split about 50/50 for and against the list. Seeing that *Customer Inter@ction Solutions*<sup>®</sup> magazine primarily reaches people that are knowledgeable about contact centers, and many of you are employed in this space, I was surprised at the 50/50 ratio above. I would have thought more people in our readership would be against the list.

Obviously, telemarketers in general aren't liked and that is a mild statement. The flipside to this statement is that many of us are happy to receive calls reminding us about subscriptions that have run out or special offers on credit card protection or sales in our local stores. Obviously, this is true as so much business is being done through the use of outbound calling. In fact we can chalk up about \$300 billion dollars of sales in the U.S. economy to outbound telemarketing! (For more information, please see my [February 2003 issue High Priority!](#) for details.

Many e-mails we received told us that the industry should have done a better job of regulating itself, and I find this is a tough argument to accept because there has been a DMA do-not-call list in place for over 20 years, with over four million phone numbers on it. This list didn't get created by accident...the industry was policing itself and still does. Part of the problem is that many companies are using the phone to sell scams and illegal investment opportunities. These people aren't in the call center industry, in my opinion. They are criminals, in many cases, that are breaking laws when they call to sell you investments in ostrich farms that don't exist. If these unscrupulous callers

don't abide by federal laws, it is doubtful that they will now or ever respect any do-not-call list that is established. Likewise, they aren't likely to break federal laws that risk jail yet succumb to "industry policing."

Therein lies the problem. The industry has done a good job policing itself over the decades, but a bad job of letting the world know about it. What on earth more can be done besides establishing our own do-not-call list and abiding by it? I guarantee that the federal government will have a bear of a time enforcing their own list...especially when calls originate overseas. What more could "the industry" have done?

I am very concerned about a federally sponsored do-not-call list, as it will receive tremendous marketing via all media outlets. This list will grow rapidly as a result of all of this attention and as it grows, the pool of available numbers to call will shrink indefinitely. There will be an accelerated need to join the list as remaining households will receive ever-increasing calls. Without a doubt this will cause worldwide economic catastrophe. I am not an alarmist. But mark my words, when I say the government backing and subsequent free marketing of this list will plunge the world into depression. Few businesses are doing well right now...record numbers of companies are teetering on bankruptcy. The economy cannot support such a huge amount of lost sales and related three to five million job losses.

Worse yet, consider the cost of starting any type of business that involves the phone. Also, realize that most companies do use the phone to sell products on an outbound basis. The cost of checking phone numbers against multiple lists is prohibitively expensive for start-ups, meaning they may never be able to use the phone to sell products and services. This will result in making it even more difficult to start a new company. This is the opposite of what our administration needs to be doing right now. We are talking about business disaster here.

Understand the chain reaction that takes place when something is sold. Manufacturers, distributors and resellers all take a piece of a sale. If I use the phone to sell consumers a new garden rake that is made in China, myriad companies and employees derive sustenance from that sale. Kill the sales; lose the jobs, increase unemployment rates, bankruptcy rates, etc.

I have had a number of e-mails from people telling me that they don't care what happens to telemarketers as they are worse than drug dealers, etc. The problem is many of these people who feel this way don't realize that the companies they work for are in many cases dependant on outbound telemarketing for their very existence. I received a few e-mails against telemarketing where their e-mail address belongs to companies that sell call center/dialing equipment. These people are either ill-informed, not too bright or are happy to be unemployed. It's difficult to tell.

This is the same thing that happens when newspaper reporters complain about telemarketers without realizing what a large percentage of newspaper subscriptions are sold via phone. In other words, they are employed in part due



to the efforts of telemarketers!

In many cases, telemarketing centers hire single parents, military wives, students, the elderly and the handicapped and other people that are not otherwise particularly employable. The majority of these people are employed in rural communities where there are no other employment opportunities. This is a very dangerous game we are playing at a time when our economy can't handle much more. These rural communities will be rife with unemployed workers.

Another argument I received is that companies need to find new ways to market besides the phone. Are there any untapped marketing vehicles that you are aware of? I am not aware of any. There is nothing as efficient as telemarketing, plain and simple. Internet? E-mail? I don't think so. Spam is making it difficult to even get an e-mail through to your spouse without it accidentally being erased by over-ambitious anti-spam software. We will definitely see sales further reduced at a ridiculous rate.

Furthermore, I take issue with the way these lists work. They are all phone number-based, and there is no method of managing this problem. In my household and many others, we want certain calls and don't want others. I am looking for life insurance...if Allstate were to call me with an unbeatable deal, I want them to send me info. I love car magazines and like just about all others. I would appreciate calls from most publishing companies. My wife doesn't like telemarketing calls unless it is Loehmann's, Saks, etc. Furthermore, we prefer no calls before 10:00 a.m. at home on the weekends while calls after 8:00 p.m. during the week are perfect. Many of us are used to setting preferences like these for e-mail newsletters. We need a like system for telemarketing. The list should be based on person and phone number, and allow people to receive calls on some topics and not others.

Another good idea is a global clearinghouse on calling — restricting telemarketing calls per household to perhaps two or three per week. At the moment, there is no way to assure that every telemarketer in the world doesn't call you simultaneously. We do need to figure out a way to achieve this goal.

In conclusion, we appreciate all the letters that were sent on this topic. We set feedback records. But I am convinced that this list will spell disaster for the world's economy. I am not an alarmist, but I am someone that realizes that \$300 billion dollars in sales are at stake and that the economy is too fragile to handle this blow. I agree that something more needs to be done, and besides the ideas I propose above, I am not sure how else to go about solving this problem. I still think a government-backed, number-only list is a bad idea. I am always open to suggestions. If you have additional suggestions, please e-mail me at [rtehrani@tmcnet.com](mailto:rtehrani@tmcnet.com).

Sincerely,  
Rich Tehrani  
Group Publisher,  
Group Editor-in-Chief

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Over the last 15 years, the National Entertainment Affiliate Program (NEAP) has compiled a unique database. It includes potential clientele who have entered their name and phone number, either online at [www.digitalwinnings.com](http://www.digitalwinnings.com), or in shopping malls throughout the country, to win an award (i.e., car, digital camera, satellite dish, cell phone, travel package, etc.). Other forms of collecting this data are through selected hotels, resorts and restaurants throughout the country. Currently the NEAP gets approximately 25,000 new entries per day into its unique database. This translates into a dynamic database of potential clients. The NEAP only uses its database for specified clientele, and a territory is designated exclusively based on your requested call volume.

The purpose of our program is to create inbound calls for your company. We do this, by designing a script for your specific product and/or service. We then do a message broadcast leaving your message in thousands of homes and businesses throughout the country. If a potential customer is interested in your particular product or service, they will then call back on a designated 800 number, which will route them directly to your call center. The response rate is remarkable due to the quality of the database.

The inbound calls are ordered and paid for a minimum of 72 hours from scheduled start date. The program guidelines are as follows: Calls must be ordered in weekly increments; calls are billed at a starting rate of \$10 per call, Monday through Saturday. Our company pays for all inbound long-distance phone charges.

## Special Features

- Automatic Tracking and Reporting
- Unique Opt-in Database
- Exclusive Designated Territories
- Compliance Services
- Custom Designed to Your Industry
- Weekly Flexibility



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October 16, 2002

RE: Delivery of Recordings

As you requested, this letter will set forth the regime of laws applicable to the delivery of recordings to consumers.

## **FEDERAL LAW**

As you may know, the delivery of recorded telephone calls is regulated at the federal level by the FCC through the Telephone Consumer Protection Act and its accompanying regulations. I've attached the law and the regulation for your convenience.

The T.C.P.A. prohibits initiating "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes *or is exempted by rule or order* . . ." 47 U.S.C. § 227. The regulations *exempt the following types of calls*: (1) calls which are not made for commercial purposes; (2) calls which are made for a commercial purpose but do not include the transmission of any unsolicited advertisement; (3) calls to any person with whom the caller has an established business relationship at the time the call is made; or (4) calls made by a tax exempt nonprofit organization. 47 C.F.R. § 64.1200(c). The T.C.P.A. requires that all calls using recorded or artificial voices disclose, at the beginning of the message, the identity of the business or individual making the call and during or after the message state clearly the telephone number or address of such business or individual. Id. at § 64.1200(d).

"Established business relationship" is defined as:

A prior or existing relationship formed by a voluntary two way communication between a person or entity and a residential subscriber with or without an exchange of consideration, the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by the such person or entity, which relationship has not been previously terminated by either party.

47 C.F.R. § 164.1200(f)(4).

Thus no exchange or consideration is required: a previous inquiry by the consumer is enough to meet this definition. The FCC commentary to the Rule, further, takes a very expansive view of this term: "... we find that a consumer's established relationship with one company may also extend to the company's affiliates and subsidiaries." 7 FCC Rec. 8752, ¶34.

"Unsolicited advertisement" is defined as: "Any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's prior express invitation or permission." 47 C.F.R. § 64.1200(f)(5).

**Thus, calls to persons with whom you, a subsidiary or affiliate have an existing business relationship are exempt from the ban as are calls which do not contain information regarding the availability or quality of specific goods or services. The former category, obviously, gives opportunity for cross marketing of products, while the latter allows calls with certain scripting to any consumer.**

It is my opinion that the Federal T.C.P.A. preempts more restrictive state laws affecting the delivery of recordings with regard to interstate phone calls. First, the T.C.P.A. specifically states that "Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits - - (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations." 47 U.S.C.A. § 227(e)(1). Although ambiguous, in my opinion, this language states that the law does not preempt intrastate requirements.

The legislative history to the T.C.P.A. reinforces the opinion that states do not have jurisdiction over interstate calls. "Over forty states have enacted legislation limiting the use of [recordings]. These measures have had limited affect, however because states do not have jurisdiction over interstate calls." Legislative History, Senate Report No.102-178, p. 3. Two federal appellate cases hold that states have no jurisdiction over interstate calls due to preemption by the T.C.P.A.. International Science Technology Institute, Inc., v. Inacom Communications, Inc., 106 F.3d 1146, 1154 (4th Cir. 1997); Chair King, Inc., v. Houston's Cellular Corp., et al. 131 F.3d 507, 513 (5th Cir. 1997).

Furthermore, the FCC has responded to consumer inquiries concerning preemption and stated unequivocally that it is the FCC's position that the T.C.P.A. preempts state regulation of interstate calls with regard to recorded messages. Specifically, a March 3, 1998 letter from Geraldine A. Matisse Chief, Network Services Division, to Mr. Sanford L. Schenberg states that: "In light of the provisions described above, states can regulate and restrict intrastate commercial telemarketing calls. The T.C.P.A. and Commission Regulations, enacted pursuant to the T.C.P.A., govern interstate commercial telemarketing calls in the United States." Similarly, a

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January 26, 1998 letter from Ms. Matisse to Delegate Ronald A. Guns of the Maryland House of Delegates, specifically addressed the delivery of recordings by telephone and states that: "In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland cannot apply its statutes to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state."

The definition of "interstate communication" is clearly defined in the Telecommunications Act of 1934 as "any communication from any state to any state." 47 USCS § 153(22). The Guns letter specifically addresses state law applicable to the delivery of recordings and is attached hereto for your convenience.

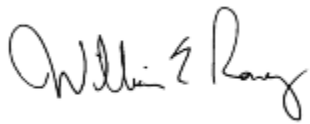
Finally, this opinion is reinforced by a Senate Resolution recently adopted in the State of Kentucky which highlights the lack of authority by states over interstate calls. In the Resolution, the Kentucky Senate urged the United States Congress to grant states power over interstate calls because it was currently lacking such jurisdiction under the current regime making "do-not-call" list laws ineffective. 2001 Kentucky Senate Resolution 162.

With that being said, many states have passed laws that would restrict the use of recordings for intrastate calls.

**Thus, you can deliver recordings to consumers if the recording does not include an unsolicited advertisement or are to consumers who are your existing subscribers or customers of your affiliates or subsidiaries. In my opinion, you can script a call so as to avoid this definition by not including information concerning the availability or quality of any property, goods or services.**

Please call me if you would like to discuss this matter further.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "William E. Raney". The signature is fluid and cursive, with the first name "William" and last name "Raney" clearly distinguishable.

William E. Raney  
For the Firm

WER/tmg  
Enclosure



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# Don't Call Us, We'll Call You

Matthew Kauffman

May 21 2003

I got a call the other day from "Sharon," one of the telemarketing drones for AT&T. And after abruptly assuring her I was pleased as punch with my current long-distance telephone service, I found myself pondering whether my impatient attitude might have trampled Sharon's precious constitutional rights.

The telemarketing industry seems to think so, in yet another sign of just how out of touch it is with consumers.

This July, millions of Americans will gleefully sign on to a national do-not-call registry, formally expressing their desire to enjoy dinner without the latest pitches for replacement windows or home equity loans or Disney vacations. Over the years, 27 states, Connecticut included, have adopted do-not-call lists, and the federal law will instantly extend that to every residential telephone in the land.

It's a bitter pill for the Direct Marketing Association, which enjoyed a decadelong run of successfully blocking the feds from enacting a simple, nationwide leave-me-alone list. So the trade group has launched a bizarre counterattack, grasping at claims that consumers actually appreciate telemarketing and that a do-not-call list will idle zillions of grateful employees.

But strangest of all is the assertion that it would be downright unpatriotic to separate this great nation's citizens from this great nation's vinyl-siding salesmen. The battle over telemarketing, they want us to believe, is really about free speech and the First Amendment. And they've gone to court to prove it.

"Free speech is too important to our free society to be so limited," one flag-waving telemarketer wrote the Federal Trade Commission, urging rejection of a do-not-call list. "For these reasons, we tolerate:

Some distasteful pornography,

Distortions (and sometimes worse) of a free press,

The nuisance of receiving some telemarketing calls that we don't want."

So there you have it! Telemarketing is as important to Jefferson's America as Juggs magazine and Jayson Blair!

I took Constitutional Law in college, and I still remember the great First Amendment cases - Tinker vs. Des Moines, New York Times vs. Sullivan, Near vs. Minnesota. I don't remember anything that

suggested marketing companies have a constitutionally protected right to bother you at home, even after you've asked not to be bothered.

Companies, of course, do have free-speech protections. But in suing to strike down the do-not-call list, telemarketers are claiming not simply a First Amendment right to advertise their products, but also a right to demand entry into our homes to make their pitches.

Let America's purveyors of "distasteful pornography" insist on a door-to-door display of their wares, and we'll see how fast they get a lesson in the fineries of First Amendment law.

The Direct Marketing Association lost the first round in federal court when a judge refused to put the do-not-call list on hold. But the association has counter-arguments that go beyond the courthouse.

Get the impression your relatives, friends and neighbors are annoyed by telemarketing? You must be mistaken, based on industry statistics that suggest consumers can't get enough of telephone solicitations.

The DMA argues that in 2001, 185 million American consumers spent \$661 billion on goods purchased over the phone. Their conclusion: Consumers love us!

The numbers suggest some creative accounting - it works out to \$3,573 per customer, which, if true, means I sure haven't been pulling my weight. But even if consumers spent \$600 trillion on phone sales, those consumers who'd rather buy their vitamins and seafood through other channels ought to be able to opt out.

The industry also begs mercy for all those poor saps on the other end of the line, saying a do-not-call list will throw millions of call-center employees onto the unemployment rolls. (Which, come to think of it, is pretty much the argument cocaine-producing countries use.)

"The FTC's plans to kill outbound telemarketing, one of the most effective sales and marketing tools in business, will inevitably put a financial stranglehold on corporate America, eliminating countless American jobs," a Connecticut publisher of telemarketing trade journals wrote earlier this year.

Who knew that the nation's economy - and corporate America itself - rises and falls with the fortunes of telemarketers?

I've even seen arguments that a do-not-call list would be bad for the economy because it would hurt companies that make anti-telemarketing devices, such as the Telezapper. This is like arguing against the polio vaccine on behalf of America's wheelchair manufacturers.

What makes the industry's campaign against a national do-not-call list particularly odd is that the Direct Marketing Association already maintains a list of its own, which its members must honor.

The company line: "Marketers do not want to spend time and money marketing to consumers who prefer not to shop by phone," the association says in its Teleservices Fact Sheet.

Of course they do. If they didn't, they'd be cheering the loudest over the convenience of scrubbing names off a single list of people who don't want to be bugged.

The truth is, people who would not otherwise be inclined to buy can be talked into it or pressured into it or suckered into it by a good pitch. That's what salesmanship is all about.



And losing those vulnerable customers is what telemarketers really fear from a do-not-call list.

The Direct Marketing Association has 7.5 million names on its little-known do-not-call list (where consumers have to pay \$5 to register online).

It's a drop in the bucket, compared with what's coming. In California alone, state officials estimate, 3 million to 5 million residents will sign up for the free government-run list. In Missouri, more than half of all households have signed up for that state's do-not-call list. In Connecticut, the figure's about 40 percent.

I'm not surprised that the industry is scared by what lies ahead. But telemarketers have had a better run than they deserve. It's time they learned a new paradigm: When the front door closes, people have the right to be left alone.

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